

Remarks of Temple Sellers
VP, Legal Services
Georgia Hospital Association
February 17, 2006
Atlanta, Georgia

Good morning. My name is Temple Sellers. I am the VP of Legal Services for the Georgia Hospital Association. GHA is an association representing approx. 180 hospitals and health systems in Georgia, urban and rural, for-profit and not-for-profit alike. I want to thank you on behalf of our members for the opportunity to speak to you today about this important subject. We have provided you with a letter from our President, Joe Parker, which includes a more detailed explanation of our position than I will be able to provide in the few minutes I have with you this morning.

I want to begin my remarks by stating that we are in total agreement with the points made by Dr. Campbell. We also agree with Neal Childer's assessment that DCH lacks the legal authority to exempt general surgery ASCs from CON review. I am going to spend my few minutes with you talking about two issues, general surgery as a medical specialty and public policy considerations that support continued CON review of general surgery ASCs.

With respect to general surgery, let me clearly state our belief that it is a medical specialty. It is recognized as such by the American Board of Medical Specialists and I don't think anyone involved in this debate fails to recognize that fact. That being said I also want to say that fact is completely irrelevant to whether general surgery ASCs should be subject to CON review.

The heart of the argument made by those who would change the rule is that the word "specialty" has the same meaning in the CON law that it has in the medical community. This is not a new argument. In fact, it is the same argument made by a group of general surgeons in a case before the Georgia Court of Appeals in 2002 in the *Albany Surgical* case we discuss more fully in our letter. The general surgeons tried to get the Courts to declare the rules invalid because they don't recognize general surgery as a specialty. The Court refused that request and explained, "the intent of the General Assembly for a CON differs from the intent of the American Board of Medical Specialties in drafting its definition" of a specialty. In essence the Court said one thing has nothing to do with the other. There are completely different policy considerations at issue when determining whether general surgery should be considered a single-specialty for purposes of qualifying for a CON exemption.

What are these policy considerations? The Georgia Society of General Surgeons argues that it is in the public interest to exempt general surgery ASCs from CON review. That exemption would allow general surgery ASCs to develop even when there is no

demonstrable need for the services and it would exempt them from any requirement to provide indigent care. That would not serve the public interest. Instead, we believe the public interest is better served by the current system that requires general surgeons to demonstrate a need for a new ASC and to commit to provide a minimum level of indigent care in order to obtain a CON.

GHA believes granting these exceptions would further weaken Georgia's safety net. Hospitals are literally the medical safety net for millions of Georgians. It is hospitals, not physician-owned ASCs, that provide 24/7 emergency services, trauma services, neo-natal intensive care services and the most complex surgical services. Many of these essential services are provided at a loss and hospitals must be able to offset these losses by offering services that generate higher revenues. As the court in Albany Surgical stated, "if a general surgery practice was permitted exemption from a CON, then surgeons would set up many ambulatory surgical centers that would duplicate hospital surgical suites, taking away centers of profit by paying patients and leaving indigent surgical patients to the hospitals."

This is precisely what has occurred in Georgia with respect to ASCs since the legislature enacted the exemption in 1991. There has been a proliferation of ASCs that offer only the most profitable services. According to the Federated Ambulatory Surgery Association, Georgia now has more ASCs than all but 3 other states. The vast majority of these are physician-owned single-specialty ASCs that are exempt from CON review and from the requirement to demonstrate community need or to provide indigent care. They have siphoned off much needed revenue from Georgia's hospitals and in the process have weakened Georgia's safety net.

In closing, the problem isn't that general surgeons are being unfairly treated because they aren't able to evade an indigent care commitment just like other medical specialties. The problem is that these other specialties are able to do so. I know I have used up my time and want to thank you again for your attention this morning.



February 14, 2006

Daniel W. Rahn, M.D.
Chairman
Health Strategies Council
2 Peachtree Street, N.W.
Atlanta, Georgia 30303

Re: General Surgery and CON Review

Dear Chairman Rahn:

This letter is in response to the recent letter from the Georgia Society of General Surgeons urging the Health Strategies Council (the Council) to direct the Department of Community Health (DCH) to change its long-standing rule providing that an ambulatory surgery center (ASC) engaged only in the practice of general surgery does not qualify for the single-specialty exemption from Certificate of Need (CON) review. As discussed more fully below, GHA urges the Council to reject this request for the following reasons:

- The General Assembly did not intend intent to exempt general surgery ASCs from CON review when it amended the CON Act in 1991;
- Public policy considerations overwhelmingly support requiring CON review for general surgery ASCs; and
- The General Assembly has charged the CON Commission with determining whether any statutory or regulatory changes are needed to the CON statutes and regulations and the Commission should be given time to complete its charge before the Council takes any action related to this issue.

1991 Amendment to the CON Act

In 1991, the General Assembly amended the CON Act to exempt from CON review physician-owned single-specialty surgery centers having a total capital expenditure below a specified threshold. The Georgia Society of General Surgeons notes that general surgery is recognized by the American Board of Medical Specialists as a medical specialty. They argue the term "specialty" as used in the 1991 amendment must be interpreted according to the significance attached to that term by the American Board of Medical Specialists and others in the medical

community. Accordingly, they contend general surgery ASCs are entitled to the single-specialty CON exemption. This is not a new contention. General surgeons have made the same argument to the Georgia courts and the courts have soundly rejected it. In *Albany Surgical, P.C. v. Dept. of Community Health*, 257 Ga.App. 636, 572 S.E. 2d 638 (2002), a group of general surgeons attempted to obtain a declaration from the courts that the CON Rules are invalid to the extent they fail to recognize general surgery as a single specialty. The Court of Appeals of Georgia dismissed this argument, noting “the intent of the General Assembly for a CON differs from the intent of the American Board of Medical Specialties in drafting its definition” of a specialty. The court stated “General Surgery reaches a wider patient pool than other specialties and overlaps numerous other surgical specialties. Since the purpose of a CON is to avoid duplication of medical services, then the regulation serves such purpose, avoiding underutilized surgical suites by allowing the proliferation of competing ambulatory surgical centers.”

The court explained that the CON Act clearly articulates a preference for CON review except where the legislature has “clearly and expressly” provided exceptions and further noted the courts have consistently held that DCH “lacks authority to expand or create new exceptions.” When the legislature passed the 1991 amendment, DCH had in existence a regulation that excluded general surgery as a single specialty. If the legislature intended to change the law, rather than to codify DCH’s existing policy and practice regarding general surgery, it would have done so expressly. The court therefore stated, “the legislature did not intend to include general surgery as a singly specialty within the meaning of the single specialty exemption.”

It is therefore clear that Georgia’s courts have concluded the legislature did not intend to exclude general surgery ASCs from CON review. Both the courts and the Attorney General’s office have also opined that DCH lacks the legal authority to expand or create new exceptions through rulemaking. Only the legislature can make such a change and GHA urges the Council to reject this attempt by the Georgia Society of General Surgeons to circumvent the will of the legislature.

Public Policy Considerations

In addition to avoiding unnecessary and costly duplication of services, other policies underlying the CON Act include ensuring adequate health care services and facilities “are made available to all citizens” and “that only those health care services found to be in the public interest” will be provided. (OCGA § 31-6-1). The Georgia Society of General Surgeons argues the public interest would best be served by exempting general surgery ASCs from CON review, i.e., from the requirement to demonstrate any need for the services they wish to provide and from any requirement that these facilities share in the burden of providing indigent care.

GHA does not agree that this is in the public interest. We urge the Council members to consider the following facts. Each year Georgia's full service community hospitals provide hundreds of millions of dollars of uncompensated care to Georgia citizens. Georgia has one of the lowest levels of expenditure per Medicaid enrollee in the country, and currently pays hospitals only 85.6 percent of cost for outpatient services, including outpatient surgery. This means hospital lose money every time they treat a Medicaid patient. In addition, the number of uninsured Georgians continues to rise and these patients generally obtain services through the hospital emergency departments and pay little, if anything, for them.

Full service community hospitals are literally the medical safety net for millions of Georgians. It is hospitals, not physician-owned ASCs, that provide 24/7 emergency services, trauma services, neo-natal intensive care services and the most complex surgical services. Many of these essential services are provided at a loss and hospitals must be able to offset these losses by offering services that generate higher revenues. As the court in *Albany Surgical* stated, "if a general surgery practice was permitted exemption from a CON, then surgeons would set up many ambulatory surgical centers that would duplicate hospital surgical suites, taking away centers of profit by paying patients and leaving indigent surgical patients to the hospitals." This is precisely what has occurred in Georgia with respect to ASCs since the legislature enacted the exemption in 1991. There has been a proliferation of ASCs that offer only the most profitable services. According to the Federated Ambulatory Surgery Association, Georgia now has more ASCs than all but 3 other states.¹ The vast majority of these are physician-owned single-specialty ASCs that are exempt from CON review and from the requirement to demonstrate need or to provide indigent care. They have siphoned off much needed revenue from Georgia's hospitals and in the process have weakened Georgia's safety net.

The Georgia Society of General Surgeons also argues hospitals oppose an exception for general surgery ASCs because they do not want the competition. This argument is misleading. Hospitals do not fear competition as long as it is fair. However; hospitals do oppose the unfair competitive advantage that exists when physicians own the facilities where they refer their patients. Numerous studies have found that physician-owners refer the healthiest patients to their facilities and the sickest patients to the full service community hospitals; and refer the patients with better-paying insurance to their own facilities and the uninsured, indigent and Medicaid patients to the full service community hospitals. This cherry picking leads to high profits for physician owners and places the financial health of full-service hospitals in jeopardy.

¹ The Federated Ambulatory Surgery Association (FASA) is a non-profit association representing the interests of ambulatory surgical centers throughout the nation. According to FASA, only Florida, California and Maryland have more ambulatory surgery centers than Georgia. See www.fasa.org/.

The fact that full service community hospitals must provide emergency services to anyone that needs them, regardless of ability to pay, further places hospitals at a competitive disadvantage. Unlike hospitals, physician-owned ASCs can choose which procedures they will offer. They will not compete with hospitals to provide complex surgical procedures, emergency and trauma services or to serve Medicaid patients and the uninsured. It is not fair competition the Georgia Society of General Surgeons seeks; it is selective competition that would weaken the ability of full-service community hospitals to meet the needs of all citizens, regardless of ability to pay.

CON Commission

In 2005, the General Assembly created the State Commission on Efficacy of Certificate of Need "for the purpose of studying and collecting information and data relating to the effectiveness of the CON program," and to "conduct a comprehensive review of that program."

The Commission has been meeting monthly for the past year and several meetings have focused largely on the issue of whether general surgery should be classified as a single-specialty for purposes of the exemption from CON review. The Georgia Society of General Surgeons presented testimony to the Commission, as did GHA and other hospitals associations.

The Commission decided to postpone making any recommendation regarding this issue until it has the opportunity to fully consider all the complex issues involved, including the impact on services, volume and quality of care; financial access (indigent care; Medicaid, uninsured); cross-subsidization; impact on safety net providers; impact on rural hospitals; impact on medical education; impact on trauma and emergency room services; physician self-referral issues; the perspectives of physicians, including hospital-based and primary care physicians; and hospital financial viability. The Commission's report is due no later than July of 2007 and it may issue its report before the 2007 legislative session. The legislature has established a process for addressing this issue and GHA believes that process should be respected by all interested parties, including the Georgia Society of General Surgeons.

Conclusion

Georgia's courts have made it clear the legislature did not intend to exempt general surgery ASCs from CON review or from the requirement to demonstrate need for their proposed services and to provide indigent care. Any argument to the contrary is inconsistent with the governing statutes, regulations and court decisions and should be rejected by this Council. As DCH General Counsel Neal Childers explained at the last Council meeting, DCH lacks authority to expand or create new exceptions by rulemaking. In addition, it is not in the public interest to exempt general surgery ASCs from CON review. The CON program is intended to prevent unnecessary duplication of services by requiring an applicant demonstrate need for a proposed service. There is nothing in the current rules to prevent an applicant who can demonstrate need from opening a general surgery ASC. The public interest is also served by a

requirement that general surgery ASCs provide indigent care. Georgia's hospitals provide hundreds of millions of dollars in uncompensated care each year. Any attempt to further reduce the number of health care entities that share this burden should be soundly rejected.

Finally, the CON Commission has been charged with determining whether any changes are needed to Georgia's CON program and the Commission should be given the opportunity to carefully consider all aspects of this complex issue before any decisions are made, either by the legislature or by DCH, to address the issue of general surgery ASCs.

Thank you for your consideration of these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph A. Parker". The signature is fluid and cursive, with the first name "Joseph" and last name "Parker" clearly distinguishable.

Joseph A. Parker
President

c: Health Strategies Council Members
Rhonda Medows, M.D., Commissioner, Georgia Department of Community Health
Neal Childers, General Counsel, Georgia Department of Community Health